83-257

No. 83-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

CITY COUNCIL OF AUGUSTA, GEORGIA,
Petitioner,

v.

JIMMY ALLEN ALEWINE, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Is the operation of a local public transit service by a political subdivision of one of the states one of the "traditional governmental functions" which is exempt from Commerce Clause regulation under *National League of Cities v. Usery*, 426 U.S. 833 (1976)?

This same question is presently before the Court in case No. 82-1951, *Donovan v. San Antonio Metropolitan Transit Authority*, appeal docketed June 1, 1983, and Case No. 82-1974, *City of Macon v. Joiner*, appeal docketed June 3, 1983.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit were as follows:

Appellants: Jimmy Allen Alewine, Lee Kelly, Jr., Leonard L. Lewis, Ben Major, Jr., John L. Manning, William H. Smith and Sol Usry.

Appellee: City Council of Augusta, Georgia, a municipal corporation and a political subdivision of the State of Georgia.

Intervenor: United States of America.

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CITY COUNCIL OF AUGUSTA, GEORGIA,
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v.

JIMMY ALLEN ALEWINE, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The City Council of Augusta, Georgia respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in the above-captioned case.

OPINIONS BELOW

The Opinion of the District Court, *Alewine, et al. v. City Council of Augusta, Georgia,* is reported at 505 F. Supp. 800 (M.D. Ga. 1981) and is reproduced in the Appendix at page 23a. The Opinion of the United States Court of Appeals for the Eleventh Circuit is recorded at 699 F.2d 1060 (11th Cir. 1983), and is reproduced in the Appendix at page 1a.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on March 7, 1983, and a denial of the petitioner's request for re-hearing was entered on May 19, 1983. Additionally, an order staying the mandate and giving petitioner ninety (90) days within which to file his petition for certiorari was granted by the Eleventh Circuit on June 21, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following:

Article I, Section 8 of, as well as, the Tenth Amendment to the Constitution of the United States; and the Fair Labor Standards Act (FLSA), as amended, 29 U.S.C. § 201, *et seq.* These constitutional and statutory provisions are reproduced in the Appendix, beginning at page 49a.

STATEMENT OF THE CASE

1. Originally the provisions of the FLSA exempted employees of street cars, trolley and motor bus carriers from the application of the minimum wage and maximum hour provisions. This exemption, however, has gradually been eroded by a series of amendments to the Act. The 1966 amendments extended coverage to employees of all transit companies, both public and privately owned, but did not provide overtime pay protection to operating personnel of transit companies. The 1974 amendments to the Act repealed, in stages, this exemption for operating personnel and provided that beginning May 1, 1976, all operating personnel were to be paid overtime compensation for hours worked in excess of forty (40) hours per week.

The constitutionality of the 1974 extension of the FLSA was tested in *National League of Cities v. Usery*, 426 U.S. 833 (1976). This Court in that decision determined that Congress could not, under the Commerce Clause, effect legislation which would "operate to directly displace the states' freedom to structure integral operations in areas of traditional governmental functions . . . ." *Id.* at 852.

Subsequent to this Court's decision in *National League of Cities v. Usery*, the Secretary of Labor amended his FLSA enforcement policy to exclude those "integral-traditional" functions of state government. On December 21, 1979, however, the Secretary of Labor again amended his enforcement policy, 44 Fed. Reg. 75630 (December 21, 1979), and declared municipal transit bus systems to be within the non-traditional classification of municipal activities and as such not protected by the Tenth Amendment immunity enunciated by this Court in *National League of Cities v. Usery*. 426 U.S. at 852.

2. Prior to 1950, local bus service in Augusta, Georgia was provided by the Georgia Power Company. In 1950, the Augusta Coach Company, a private corporation, purchased the bus company and began operating a local bus service in the City of Augusta. In early 1973, the City of Augusta executed an option to purchase the assets of the Augusta Coach Company and for six months thereafter while an application for Federal assistance under the Urban Mass Transportation Act of 1964, 49 U.S.C. 1601 *et seq.* (UMTA), was prepared, the City of Augusta provided operating assistance to the Augusta Coach Company. Had it not been for the City's agreement to purchase the Coach Company's assets and supply the service, transit service in Augusta would have been discontinued. 505 F. Supp. at 884. On November 7, 1973, the City of Augusta purchased the assets of the Augusta Coach Company with Federal assistance and commenced local operations through the Augusta Transit

Department on November 21, 1973. The bus service provided by the Augusta Transit Department is similar to that previously provided by the Augusta Coach Company prior to the public take over. The Transit Department of the City of Augusta retained the drivers and non-operating personnel previously employed by the Augusta Coach Company. Since May 1, 1976, the City has paid overtime pay to bus drivers only for hours worked in excess of forty-eight (48) hours per week; the City pays mechanics in the Transit Department overtime after forty (40) hours per week. Since the City of Augusta took over transit operations, the Transit Department has been administered like any other City department, run by a department head responsible to the Mayor for the performance of the Department.

At the present time passengers are charged a fare for riding the intrastate fixed route scheduled bus service provided by the City Transit Department. Nonetheless, the transit system operates at a huge loss. For the years 1973 through 1978, the total net operating loss of the Transit Department was one million, three hundred, eighty-three thousand, six hundred, sixty-six and 13/100 dollars ($1,383,666.13). *Id.* at 885. Although the Federal Government through the Urban Mass Transportation Administration has absorbed approximately fifty percent (50%) of the system's operating loss, the City of Augusta is required to make up the remainder of the net operating loss.

3. The plaintiffs in this action are present or former employees of the City Council of Augusta, Georgia who, at the time of the filing of the complaint, were working or had worked within the preceding three (3) years as bus drivers for the City of Augusta. The plaintiffs sought injunctive relief, back pay, liquidated damages, and attorney's fees against the City of Augusta pursuant to the overtime provisions of the FLSA, as amended, 29 U.S.C. §§ 201-219, and additionally, under the provisions of

Section 2-48 of the Code of the City of Augusta, Georgia, 1972, s amended, pages 177-178. The District Court in its opinion stated that "[I] cannot conclude that traditional government functions must be those which are time honored, hoary or historic. Integral operations of traditional government functions may be those which the public has come to expect and demand in light of the change of times and needs of society." 505 F. Supp. at 889. The District Court therefore concluded that the municipal bus system in Augusta was and is an integral operation of a traditional government function, and therefore, the FLSA's overtime provisions may not constitutionally apply to this system's employees. The District Court did, however, award partial back pay to the bus drivers on the basis of §§ 2-48 of the City of Augusta's Municipal Code although that award is not an issue in this appeal.

4. The respondents herein appealed the District Court's decision to the United States Court of Appeals for the Eleventh Circuit. The Eleventh Circuit, in focusing on whether a City's provision of local mass transit services qualifies as a "traditional governmental function" relied heavily on the fact that in the past the private sector was heavily involved in providing transit service. The court stated that "historically mass transit systems have been owned and operated by private companies" with "public ownership being a fairly recent development," 699 F.2d at 1068, and for this reason concluded that there could be no Tenth Amendment immunity.

REASONS FOR GRANTING THE WRIT

The only issue involved in this case is the question of whether the City's operation of a local mass transit authority is a "traditional governmental function" and as such entitled to the Tenth Amendment immunity recognized by this Court in *National League of Cities v. Usery*, 426 U.S. 833 (1976). This question is an important question concerning Congress' authority to extend

its Commerce Clause power into areas heretofore reserved to the states and their political subdivisions. Additionally, this question is presented in two other cases currently before this Court and is a question which has been inconsistently decided throughout the Circuit and District Courts. The issue in this case also involves an interpretation of whether the Tenth Amendment immunity enunciated by this Court in *National League of Cities* will only extend to those functions of state and local government which have throughout time been provided by local governments and will be excluded from other services local governments are called upon to provide as the public comes to expect and demand those operations "in light of the change of times and needs of society," 505 F. Supp. at 880, 889.

Although this Court did determine in *National League of Cities* that Congress could not under its Commerce Clause authority regulate wages paid by states and their political subdivisions to employees in areas of "traditional governmental functions," the Court did not provide any litmus tests which could be used to determine what functions were, in fact, integral and traditional.

In *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), this Court reaffirmed and restated the holding of *National League of Cities* stating (*id.* at 287-288):

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." [426 U.S.] at 854. Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." *Id.*, at 845. And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions." *Id.*, at 852.

This three step test need not be applied, however, to the issue involved in this case. In its *National League of Cities* decision, this Court has already applied those tests to bar application of the FLSA minimum wage and overtime pay provisions to "integral operations in areas of traditional governmental functions." As this Court has already applied the three *Hodel* standards in the FLSA context, and determined that the FLSA wage and overtime standards do, in fact, violate those standards, the only question before this Court is whether local mass transit is "a traditional governmental function."

In *United Transportation Union v. Long Island R.R.*, 455 U.S. 678 (1982), this Court was presented with the question of whether a state owned railroad operating in interstate commerce was an integral governmental function and, as such, exempt from application of the Railway Labor Act. This Court reversed the United States Court of Appeals for the Second Circuit by determining "that operation of a railroad engaged in interstate commerce is not an integral part of traditional state activities generally immune from federal regulation under *National League of Cities*." *Id.* at 682. In reaching this decision, the Court relied heavily on its prior holdings in *United States v. California*, 297 U.S. 175 (1936), *California v. Taylor*, 353 U.S. 553 (1957) and *Parden v. Terminal R.R. Co.*, 377 U.S. 134 (1964). In the *Long Island* decision, the Court traced the history of comprehensive federal regulation in the railroad industry. This regulation was begun in 1887 when Congress passed the Interstate Commerce Act. The Court also recognized that the Federal Government had many years ago determined that a uniform regulatory scheme was necessary to the operation of a national rail system. The *Long Island* decision pointed out that the State of New York knew of, accepted, and in fact, operated under this federal regulation for some thirteen (13) years without claiming any impairment of the states traditional sovereignty. This Court did recognize, however, that integral and traditional state

functions need not be limited to those services which the state has historically supplied. The Court recognized that traditional functions may evolve over time by stating, "[W]e are not merely following dicta of that [*National League of Cities*] decision or looking only to the past to determine what is 'traditional'." *Id.* at 836. The Court went on to state that "[t]his Court's emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulation." *Id.* It is clear therefore from *Long Island* that in determining what is in fact an integral and traditional government function, courts need not look exclusively to the past.

This Court recently again reaffirmed various aspects of its *National League of Cities* decision in the case of *EEOC v. Wyoming*, 51 USLW 4219 (March 2, 1983). In the *EEOC* decision, this Court was faced with the question of whether the provisions of the Age Discrimination Act encroached upon the Tenth Amendment immunity articulated by this Court in *National League of Cities* insofar as those provisions regulated Wyoming's employment relationship with its game wardens and other law enforcement officials. While recognizing that the management of state parks was clearly a traditional state function, this Court nonetheless concluded that the degree of federal intrusion in the area of age discrimination was sufficiently less serious than in the area of wage and overtime regulations so as to allow the age regulations to stand. In *EEOC* this Court reviewed the two consequential effects of wage and hour regulations spelled out in *National League of Cities*. The two effects recognized were (1) the financial effect that would result by forcing the states to pay their workers a minimum wage and overtime rate leaving the state with less money for other vital state programs and (2) the employment relationship effect which would prevent the states from using employment as "a tool for pursuing social and

economic policy beyond their immediate managerial goals." *Id.* at 4223. This Court reaffirmed its *National League of Cities* holding in *EEOC* when the Court recognized that federal imposition of wage and hour regulation on the states "threatened a virtual chain reaction of substantial and almost certainly unintended consequential effects on state decision making." *Id.* Although this Court struck down Wyoming's claimed immunity in the area of age discrimination, the Court again reaffirmed its recognition of the devastating result that could result from Congressional imposition of wage and hour regulations on the states or their political subdivisions.

By reviewing the decisions of this Court dealing with Tenth Amendment immunity following *National League of Cities* it becomes apparant that no clear standard has been enunciated by which the lower courts can readily determine what functions of state and local governments are integral and traditional. Justice O'Connor, dissenting, in this Court's recent decision in the case of *FERC v. Mississippi*, 102 S.Ct. 2126 (1982) recognized this fact and observed that this Court has not yet had or taken the opportunity to "fully explore the extent of 'traditional' state functions." *Id.* at 2149 n.7. The District Court in this very case recognized this fact when it stated:

> [T]his case is not an easy one. It presents a very complex question to the District Court. The conclusions are not facile nor is there a wealth of authority to guide the Court's decision. Skilled lawyers have legitimately different opinions derived after hours of careful research. It is difficult to imagine that city or state administrators, even though skilled in the law, could make a meaningful, correct determination as to whether their operations are covered by the Fair Labor Standards Act without litigation.

Alewine v. City Council of Augusta, 505 F. Supp 880, 889 (S.D. Ga. 1981).

A scan of the other District and Circuit Court decisions dealing with the question of what state functions are integral and traditional reveals a marked inconsistency both in the approach taken to deciding the question and in the result obtained. In *Amersbach v. City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979), the Sixth Circuit Court of Appeals applied a four prong test in determining that Cleveland's operation of a municipal airport was, in fact, an integral and traditional governmental function within the ambit of *National League of Cities.* The *Amersbach* court noted four elements common to each of the examples of traditional governmental functions given by this Court in *National League of Cities.*[1] Although apparently appropriate for the circumstances in Cleveland, the *Amersbach* test has not been widely used or recognized by other Circuit or District Courts. The First Circuit in *Molina-Estrada v. Puerto Rico Highway Authority*, 680 F.2d 841 (1st Cir. 1982), was faced with the question of whether or not the Puerto Rico Highway Authority which operated mass transit systems, rented parking lots, and charged toll fees for use of its highways, among other things, was an integral, traditional function of state government. That Circuit observed that "*National League of Cities* reflects an attempt to protect the states from federal regulation that might 'endanger (their) separate and independent existence'" and therefore determined that the wage and hour provisions of the FLSA could not constitutionally be applied to the Puerto Rico Highway Authority. *Id.* at 844. In addition, in the case of *San Antonio Metropolitan*

[1] The four prong test enunciated by *Amersbach* suggested that a function should be considered integral and traditional if: (1) The government service or activity benefits the community as a whole and is available to the public at little or no direct expense; (2) The service or activity is undertaken for the purpose of public service rather than pecuniary gain; (3) Government is the principal provider of the service or activity; and (4) Government is particularly suited to provide the service or perform the activity because of a community wide need for the service or activity. 598 F.2d at 1037.

Transit Authority, et al. v. Donovan, et al., the United States District Court for the Western District of Texas determined that the wage and hour provisions of the FLSA could not constitutionally be applied to a local public transit authority as such authority was, in fact, a traditional governmental function. This decision was reached after a remand from this Court directing that the District Court consider its initial decision in light of *Long Island*, an intervening decision in this Court. After further considering the matter, the District Court in Texas could find nothing in *Long Island* that compelled a change in its previous decision. That case is currently pending before this Court. *Garcia v. San Antonio Metropolitan Transit Authority*, No. 82-1913, and *Donovan v. San Antonio Metropolitan Transit Authority*, No. 82-1951.

Whereas, the above two courts have ruled that mass transit is, in fact, a traditional government functon; the Third, Sixth and Eleventh Circuits have ruled it is not.[2] The *Macon* case which was the companion of this case in the Eleventh Circuit is presently before this Court in a petition seeking a writ of certiorari. The Eleventh Circuit in both this and the *Macon* case misinterpreted this Court's decision in *Long Island*. The Eleventh Circuit concentrated almost exclusively on the historical record which reflected significant private ownership of mass transit until some time in the 1960's. Based on this record of private ownership, the Eleventh Circuit concluded that mass transit could not qualify as a "traditional government function" even in light of the fact that "a number of Courts have confronted this issue and have concluded that the maximum hours of provisions of the FLSA can not constitutionally be applied to public transit employees." 699 F.2d at 1067. Although the

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[2] *Kramer v. New Castle Area Trans. Auth.*, 677 F.2d 308 (3d Cir. 1982), cert. den. —— U.S. ——, 103, S.Ct. 786 (1983); *Dove v. Chattanooga Area Regional Trans. Auth.*, 701 F.2d 50 (6th Cir. 1983); *Alewine v. City Council of Augusta, Georgia* and *Joiner v. City of Macon*, 699 F.2d 1060 (11th Cir. 1983).

Eleventh Circuit stated that it was relying on *Long Island* in reaching the conclusion that mass transit systems were not integral and traditional, the court looked only to the past to determine what was traditional and thereby applied that static historical test which was eschewed by *Long Island.*

In summary, it is evident that application of the FLSA wage and overtime provision to a local transit system's employees will directly impair the state's or its political subdivision's ability "to structure integral operations in areas of traditional governmental functions." It is apparent that transit has become one of those governmental operations and functions which "the public has come to expect and demand in light of the change of times and needs of society." *Alewine*, 505 F. Supp. 880, 889. Application of the FLSA wage and overtime provisions to transit would directly displace "state policies regarding the manner in which they [states] will structure delivery of those governmental services which their citizens require." *National League of Cities*, 426 U.S. 833, 847 (1976).

CONCLUSION

For the foregoing reasons, the Court should grant certiorari in this case.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

Nos. 81-7490, and 81-7789

JIMMY ALLEN ALEWINE, *et al.*,
Plaintiffs-Appellants,

v.

CITY COUNCIL OF AUGUSTA, GEORGIA,
Defendant-Appellee.

C. D. JOINER, on behalf of himself and others similarly situated,
Plaintiffs-Appellees,

v.

CITY OF MACON,
Defendant-Appellant.

March 7, 1983

Appeal from the United States District Court
for the Middle District of Georgia

Appeal from the United States District Court
for the Southern District of Georgia

Before TJOFLAT and HATCHETT, Circuit Judges, and MORGAN, Senior Circuit Judge.

HATCHETT, Circuit Judge:

These cases, consolidated on appeal, require that we decide whether a municipality's operation of an urban mass transit system constitutes a traditional governmental function. If so, the tenth amendment limitation upon congressional exercise of the commerce power bars appli-

cation of the overtime compensation provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C.A. § 207 (Supp. 1982), to those public employees engaged in urban mass transit service. If not, the overtime compensation provisions of the FLSA are applicable and require the municipality to pay mass transit employees time and one-half for all hours worked in excess of forty per work week. We hold that publicly-owned mass transit is not a traditional governmental function in these cases.

I. BACKGROUND

A. *Proceedings Below*

Jimmy Allen Alewine and a class of bus drivers of the Augusta Transit Department brought suit against the City Council of Augusta (Augusta) seeking to recover overtime pay under the FLSA, 29 U.S.C.A. § 207 (Supp. 1982), and under a similar provision of the Augusta City Code, § 2-48.[1] The complaint alleged that Augusta's oper-

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[1] Section 2-48 of the Code of the City of Augusta, 1972, as amended, provides in pertinent part:

> The number of hours of work to be observed by any employee in any department of the City Council . . . except all employees of the City Council engaged in the paving, macadamizing, or otherwise improving for travel the streets and alleys of the City, or in connection with the curbing and guttering of such streets and alleys, shall not exceed forty hours per work week. [S]uch time devoted by such employee in excess of a forty hour work week shall be allowed the employee as overtime with time and one-half pay.

The City of Augusta argued in the district court that the plaintiff bus drivers were exempt from the overtime provisions of the ordinance because the bus drivers "are engaged in the paving . . . or otherwise improving for travel the streets and alleys of the City" in that their duties relieve traffic congestion and reduce pollution. Rejecting this argument, the district court noted that "[s]uch an interpretation of the clear language of the ordinance requires elasticity of logic and agility of linguistic ability this Court does not possess." 505 F.Supp. at 891. Providently, the City of Augusta has refrained from reasserting this argument on appeal.

ation of a bus service was not a traditional governmental function; and therefore, the plaintiff drivers were entitled to overtime pay for all hours worked in excess of forty per week beginning May 1, 1976. The City of Augusta acknowledged that the FLSA on its face applied and required payment of overtime after forty hours, but contended that application of the FLSA was unconstitutional in light of the Supreme Court's invalidation of the overtime provisions as applied to certain state and local governmental employees in *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976).

The district court held that the municipal bus system in Augusta is an integral operation of a traditional governmental function and therefore the FLSA's overtime provisions may not constitutionally apply to the system's employees. *Alewine v. City Council of Augusta*, 505 F.Supp. 880, 889 (S.D. Ga. 1981). Exercising pendent jurisdiction over the municipal ordinance claim, the district court awarded partial backpay to the plaintiff bus drivers for hours worked in excess of forty per week since May 1, 1976. The court determined that, in view of the City of Augusta's good faith throughout the time period relevant to the lawsuit, equity required an award of less than full backpay for violation of the municipal ordinance. Thus, the court limited the plaintiffs' recovery to two-thirds of the back pay sought. 505 F.Supp. at 893-94. The plaintiff bus drivers bring this appeal.

In a similar case, C.D. Joiner and a class of employees of the Macon Transit System sued the City of Macon (Macon) seeking a monetary recovery for hours worked in excess of forty per week since May 1, 1976, and a permanent injunction compelling Macon to pay time and one-half for overtime in the future. The plaintiff class alleged that a public transit system such as that in Macon, which serves only a portion of the community's citizens, is not a traditional governmental function. Tak-

ing the contrary position, Macon contended that employees of a publicly-owned mass transit system provide a traditionally governmental service and are therefore not covered by the FLSA. Even if public mass transit were considered a traditional governmental function, Macon argued that the invalidation of the overtime provisions to certain state and local governmental employees in *National League* precludes application of those provisions to all local government employees in the absence of a constitutionally valid amendment to the FLSA.

The district court found that the City of Macon's urban mass transit system is not an integral operation in the areas of traditional governmental functions and therefore held the overtime provisions of the FLSA constitutionally inapplicable to the plaintiff class of municipal transit employees. In addition, the district court rejected the City of Macon's argument that, because the overtime provisions of the FLSA have been held inapplicable to certain state and local governmental employees, the overtime provisions are inapplicable to all such employees in the absence of a congressional re-enactment of a constitutionally valid amendment. Citing the FLSA's severability clause,[2] which calls for application in the event the FLSA is found unconstitutional as applied to certain employees, the district court entered partial summary judgment for the plaintiff class of employees.[3] The City of Macon brings this appeal.

B. *Facts*

Alewine v. City Council of Augusta

Prior to 1950, local bus service in Augusta was provided by the Georgia Power Company. In 1950, the Au-

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[2] Title 29 U.S.C.A. § 219 (1975). *See* Part II-C of this opinion for the text of this section.

[3] The district court certified this interlocutory appeal pursuant to U.S.C.A. § 1292(b) (1966).

gusta Coach Company, a privately-owned corporation, purchased the service from Georgia Power and began operating local bus service under a franchise granted by the City of Augusta. Citing steady decreases in net income and working capital, Augusta Coach notified the City of Augusta in early 1973 that it intended to discontinue service. In April 1973, the City of Augusta executed an option to purchase the assets of the Augusta Coach Company and for six months thereafter, Augusta provided operating assistance to Augusta Coach while an application for federal assistance under UMTA was prepared. By letter dated November 7, 1973, the City of Augusta purchased the assets of Augusta Coach with federal assistance and commenced local transit operations through the Augusta Transit Department on November 21, 1973.

Augusta stipulated that had it not been for the federal grant it would not have purchased the assets of the Augusta Coach Company. Subsequent applications for capital assistance and operating grants were approved by the Urban Mass Transportation Administration. Under the terms of the grant contract, the City of Augusta guaranteed that its acquisition of the bus system would not adversely affect the system's employees, that all existing rights and benefits of employees would be continued, and that it would enter into a collective bargaining relationship with the plaintiff bus drivers' union. This guarantee was required by UMTA, 49 U.S.C.A. § 1609(c) (1976).

The bus service provided by the Augusta Transit Department is similar to that provided by the Augusta Coach Company prior to the public takeover. Fixed route scheduled bus service and charter services are provided. The transit department retained the drivers and non-operating personnel employed by the Augusta Coach Company and continues to charge passengers a fare for riding the bus. Although non-operating employees are paid

overtime compensation at time and one-half for hours beyond forty per work week, the plaintiff bus drivers are paid overtime only after forty-eight hours.

Since the City of Augusta's acquisition of the local transit system, the federal government through the Urban Mass Transportation Administration has been extensively involved with the system. The federal government has provided funding for approximately 80% of the transit department's total capital outlays. With federal assistance, Augusta has purchased new buses, constructed new bus shelters, and renovated the transit department's maintenance garage. One-half of the system's operating deficit is financed by the federal government. Furthermore, were it not for the operating grants from the federal government, the City of Augusta could not afford to operate the local transit system.

On this record, the district court held that the FLSA may not constitutionally apply to the plaintiff employees of the transit department because "the operation of the City Transit Department of Augusta is an integral operation of traditional governmental function." 505 F. Supp. at 889. The district court further held that Augusta had not waived its constitutional defense by accepting federal funds pursuant to the UMTA, 49 U.S.C.A. § 1602 (Supp. 1982), and that the terms of the agreement between Augusta and the federal government did not require compliance with the FLSA. Recognizing the difficulty of the question and the sparse guidance provided by *National League*, the district court concluded, however, that traditional governmental functions need not be "time honored, hoary, or historic," but include "those which the public has come to expect and demand in light of the change of times and needs of society." 505 F. Supp. at 889. Relying in part upon *Amersbach v. City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979), the court determined that a municipal transit system, like the public airport in *Amersbach*, qualifies as a tradi-

tional function because (1) it benefits the whole community; (2) it is available to the public at a small cost; (3) it is undertaken for public service rather than financial gain; and (4) the municipality is the principal provider of the bus service and is particularly suited to provide the service. As mentioned above, the district court did award backpay at a reduced rate based on the Augusta municipal ordinance which provides the same overtime scale as the FLSA.

Joiner v. City of Macon

Prior to December 31, 1972, the Bibb Transit Company, a private corporation, owned and operated the public transit facilities in Macon pursuant to a franchise granted by the City of Macon. Bibb Transit notified the City of Macon on November 23, 1971, and again on August 29, 1972, that it intended to cease operations and surrender its franchise due to financial exigency. As promised, Bibb Transit ceased operations on December 31, 1972, and for the next two weeks, Macon was without transit service. On January 15, 1973, Bibb Transit agreed to resume operations for two months in return for a $25,000 operating subsidy made available to Macon by the State of Georgia.

In accordance with the terms of a city council resolution passed on March 6, 1973, Macon purchased and assumed possession of the assets of the Bibb Transit Company. Macon then commenced operation of the transit system as Macon Transit System. The eleven routes served by Macon Transit are basically the same as those provided by Bibb Transit when it ceased operations in 1972.[4] Out of a population of approximately 100,000

[4] On May 1, 1981, the City of Macon transferred all of its interest in the transit system to the Macon-Bibb County Transit Authority which was created at the 1980 session of the Georgia General Assembly. Ga.Laws 1980, p. 4313 *et seq.* The plaintiffs then became employees of the Transit Authority and their claims for overtime

Macon Transit serves approximately 8,900 fares per day. The district court found that the typical passenger is female (66%), black (89%), middle-aged (80%), low income (80%), and "transit captive" (95%), that is, living in a household without an automobile available to it. Approximately 20% of all passengers are going to and from work.

Macon Transit System is funded through fares, charter income, advertising revenues, and operating subsidies, provided by the City of Macon. In addition, Macon has obtained federal revenue sharing funds and state grants to cover capital outlays. Macon applied to obtain federal funding for Macon Transit pursuant to the Urban Mass Transportation Act (UMTA), 49 U.S.C.A. § 1602 (Supp. 1982). The application was denied because Macon failed to comply with section 13(c) of the UMTA, 49 U.S.C.A. § 1609(c) (1976), relating to protections for employees. *See City of Macon v. Marshall*, 439 F.Supp. 1209 (M.D. Ga. 1977). Consequently, the system operates at a substantial loss. No other transit services are offered by public or private concerns within the City of Macon.

Based on these facts, the district court held that the City of Macon must comply with the overtime provisions of the FLSA. The district court determined that Macon Transit was not a traditional governmental function because of its close resemblance to the commercial activities of a private business. The court noted that the routing, scheduling, and administration of Macon Transit continued in the same fashion as that of its predecessor, the Bibb Transit Company. The district court concluded that municipal transit is precisely the kind of state activity subject to federal regulation. The district court

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wages were transferred to the Authority. However, as part of the process of setting up the Authority, the City agreed to remain responsible for all pending lawsuits including the instant case and will be liable for any amounts found due and owing to its former employees up until May 1, 1981.

further concluded that compliance with the FLSA would not directly displace Macon's ability to structure employment relationships with transit employees because the large majority of transit systems throughout the country provide overtime pay for work in excess of forty hours per week without apparent disruption.

On appeal, all parties agree that the question of law before us is not dependent upon the specific facts regarding Augusta's or Macon's transit system. Macon contends that the district court misread *National League* in holding that publicly-owned mass transit is not a traditional governmental function. According to Macon, compliance with the FLSA's overtime requirements displaces a municipality's ability to structure employer-employee relationships. Macon contends that it is this function that is essential to a municipality's independent existence and traditionally governmental under the reasoning of *National League.* The plaintiff class of employees in *Joiner v. City of Macon* argues that Macon's construction of *National League* immunizes from federal regulation virtually any essential activity performed by a governmental body. The plaintiff class further argues that Macon's failure to focus on mass transit from a historical perspective ignores the emphasis placed on tradition in *National League.*

The plaintiff class of bus drivers in *Alewine v. City Council of Augusta* also contends that the district court misread *National League* in finding that publicly-owned mass transit is a traditional governmental function. The Augusta plaintiff class argues that because state and local governments became involved in urban mass transit primarily because of federal funding beginning in 1964, local mass transit cannot be deemed traditionally governmental in any sense of the term.

II. DISCUSSION

A. *The Fair Labor Standards Act*

In 1938 Congress enacted the Fair Labor Standards Act requiring employers covered by the Act to pay employees minimum wages plus overtime at one and one-half times their regular rate of pay for hours worked in excess of forty per work week. 29 U.S.C. §§ 206, 207 (1940 ed.). The United States Supreme Court upheld the Act as a valid exercise of congressional authority under the commerce power. *See United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941). The FLSA as originally enacted specifically excluded from the term "employer" states and their political subdivisions. 29 U.S.C. § 203(d) (1940 ed.). With amendments in 1961, Congress extended coverage of the minimum wage and overtime provisions to certain types of public employers. The 1961 amendments extended coverage to those persons employed in enterprises engaged in commerce or in the production of goods for commerce. 29 U.S.C. §§ 203(r), 203(s), 206(b), 207(a)(2) (1964 ed.). In 1966 Congress again amended the definition of "employer" and removed the exemption previously extended to the states and their political subdivisions with respect to employees of state hospitals, institutions, and schools. 29 U.S.C. § 203(d) (1964 ed. Supp. II). These amendments were upheld against constitutional attack in *Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968).

In 1974 Congress enacted the most recent in the series of broadening amendments to the FLSA. By those amendments, the definition of "employer" specifically includes "a public agency," which is defined as including "a state or political subdivision thereof." 29 U.S.C. §§ 203(d), (x) (1970 ed. Supp. IV). By the 1974 amendments therefore, Congress removed the exemption previously afforded states and their political subdivisions and imposed upon almost all public employment the minimum

wage and maximum hour requirements previously restricted to employees of private entities engaged in interstate commerce. The 1974 amendments, in addition to extending the FLSA's coverage to most public employees, also repealed the special overtime exemption for mass transit personnel. *See* 29 U.S.C. § 213(b)(7) (1970 ed. Supp. IV). The Supreme Court addressed the constitutionality of these amendments in *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976).

In *National League*, individual states, cities, and organizations brought suit against the Secretary of Labor to test the validity of the 1974 amendments extending the statutory minimum wage and maximum hours provisions to employees of states and their political subdivisions. Acknowledging that traditional governmental activities which affect interstate commerce would be within the reach of congressional power under the Commerce Clause if performed by private entities, the Court stressed, however, that the tenth amendment imposes an affirmative limitation on the exercise of the commerce power. The Court stated that Congress cannot, consistent with the tenth amendment, enact legislation which deprives the states of those attributes "'essential to [their] separate and independent existence.'" *National League*, 426 U.S. at 847, 96 S.Ct. at 2472 (*quoting Coyle v. Smith*, 221 U.S. 559, 580, 31 S.Ct. 688, 695, 55 L.Ed. 853 (1911)). The Court held that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by art. I § 8, Cl. 3." 426 U.S. at 852, 96 S.Ct. at 2474 (footnote omitted). As examples of integral governmental functions, the Court listed fire prevention, police protection, sanitation, public health, and parks and recreation. The Court noted that "[t]hese examples are obviously not an exhaustive catalogue of the numerous line and support activities which are well

within the area of traditional operations of state and local governments." 426 U.S. at 851 n.16, 96 S.Ct. at 2474 n.16. By specifically overruling *Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968), the *National League* Court implicitly included public schools and hospitals as examples of other traditional operations of state and local governments.

The Supreme Court summarized its holding in *National League* in *Hodel v. Virginia Surface Mining & Reclamation Assoc.*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981). The Court concluded that *National League* imposes a three-part test for determining whether commerce clause legislation transgresses the tenth amendment:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged regulation regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty" and third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."

452 U.S. at 287-88, 101 S.Ct. at 2366 (citations omitted).[5] It must be noted that the *Hodel* reiteration of the holding in *National League* is useful only when determining whether a particular federal regulatory scheme is unconstitutional under *National League*. The Supreme Court already applied the three *Hodel* standards to the

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[5] Political subdivisions are accorded the same status as states under National League. *See* 426 U.S. at 855 n.20, 96 S.Ct. at 2476 n.20; *Williams v. Eastside Mental Health Center*, 669 F.2d 671, 677 n.7 (11th Cir.), *cert. denied*, —— U.S. ——, 103 S.Ct. 318, 74 L.Ed.2d 294 (1982).

FLSA in *National League*, and concluded that the attempted extension of the FLSA was not within the authority granted Congress by the Commerce Clause. Thus, *Hodel* merely provides guidance in determining whether other federal regulatory schemes, such as the Surface Mining Control & Reclamation Act in *Hodel*, are constitutionally barred by the tenth amendment when analyzed under the same guidelines as the FLSA amendments in *National League*. *Hodel* offers little guidance for the identification of traditional governmental functions. For that, we turn elsewhere.

B. *Publicly-owned Urban Mass Transit—A Traditional Governmental Function?*

The distinctive characteristic of those "protected" activities identified in *National League* as traditionally governmental is that they are all functions which the states have historically provided their citizens. In describing the state and local functions immune from federal regulation under the FLSA, the *National League* Court repeatedly employed the adjective "traditional."[6] Only through gross oversight could we ignore the conceptual attribute of "traditional" when determining whether public mass transit is an integral governmental function.

A number of courts have confronted this issue and have concluded that the maximum hour provisions of the

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[6] *See, e.g.*, 426 U.S. at 849, 96 S.Ct. at 2473: "The degree to which the FLSA amendments would interfere with traditional aspects of state sovereignty can be seen even more clearly upon examining the overtime requirement of the Act"; 426 U.S. at 851, 96 S.Ct. at 2474: "It is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens"; 426 U.S. at 851 n.16, 2474 n.16: "These examples are obviously not an exhaustive catalogue of the numerous line and support activities which are well within the area of traditional operations of state and local governments"; and 426 U.S. at 852, 96 S.Ct. at 2474: "Integral operations in areas of traditional governmental functions . . . ."

FLSA cannot constitutionally be applied to public transit employees. *See, e.g., Molina-Estrada v. Puerto Rico Highway Auth.*, 680 F.2d 841 (1st Cir. 1982); *Dove v. Chattanooga Transp. Auth.*, 539 F.Supp. 36 (E.D. Tenn. 1981), *appeal docketed*, No. 81-56-36 (6th Cir. Sept. 2, 1981).[7] We choose not to follow these decisions, however, in light of *United Transp. Union v. Long Island R.R.*, —— U.S. ——, 102 S.Ct. 1349, 71 L.Ed.2d 547 (1982). In *Long Island R.R.*, the Supreme Court unanimously reversed the Second Circuit and held that a state-owned and operated railroad primarily engaged in commuter transportation in metropolitan New York City is not a traditional government function within the meaning of *National League*. The Court concluded that the tenth amendment did not bar application of the Railway Labor Act (including its right to strike) to employees of the commuter railroad. Just as we do here, the *Long Island R.R.* Court focused on that prong of the *Hodel* standard which examines whether compliance with the federal statute in question directly impairs the state's ability " 'to structure integral operations in areas of traditional functions.' " *Long Island R.R.*, —— U.S. at ——, 102 S.Ct. at 1353, 71 L.Ed.2d at 553 (*quoting National League*, 426 U.S. at 852, 96 S.Ct. at 2474).

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[7] In *Molina-Estrada*, part-time highway construction employees sued the Authority for additional wages under the FLSA. The First Circuit held that the activities of the Authority were an intergral part of the Commonwealth Government and could therefore be termed traditional governmental functions. Although the record was unclear as to the Authority's actual activities, the court noted that "the Authority arranges for the building of roads, sometimes builds roads itself, operates toll roads, keeps its roads in repair and (we take appellants' word for it) operates some parking lots and plans to build a mass transit system." 680 F.2d at 845. Because a public mass transit system was listed and referred to by the parties as only a possibility, the Third Circuit omitted from discussion of the *National League* analysis any mention of public mass transit as a traditional governmental function.

Significant to the *Long Island R.R.* Court's determination that a publicly-operated commuter railroad is not a traditional governmental function is the fact that passenger transit operations, unlike those traditionally-public activities listed in *National League*, have historically been performed by the private sector. Emphasizing that the Second Circuit's distinction between freight carriers and passenger railroads did not justify a contrary result, the Court stated:

> Operation of passenger railroads, no less than operation of freight railroads, has traditionally been a function of private industry, not state or local governments. It is certainly true that some passenger railroads have come under state control in recent years, as have several freight lines, but that does not alter the historical reality that the operation of railroads is not among the functions *traditionally* performed by state and local governments. Federal regulation of state-owned railroads simply does not impair a State's ability to function as a State.

Long Island R.R., —— U.S. at ——, 102 S.Ct. at 1354, 71 L.Ed.2d at 554 (footnote omitted).

The result in *Long Island R.R.* has prompted a reversal in a case presenting the issue that is before us. In *Kramer v. New Castle Area Trans. Auth.*, 677 F.2d 308 (3rd Cir.), cert. denied, —— U.S. ——, 103 S.Ct. 786, 74 L.Ed.2d —— (No. 82-701), the Third Circuit reversed the district court basing its decision squarely upon *Long Island R.R.* The Third Circuit held that the operation of a public mass transit system is not a function traditionally performed by state and local governments so as to prevent application of the FLSA's overtime provisions to the bus operators employed by the New Castle Area Transit Authority. Unpersuaded by the reality that mass transit systems are being taken over by municipalities and public transportation authorities with increasing regularity, the *Kramer* court stated that "[s]tates are not free to

assume functions historically performed by the private sector and thereby insulate those activities from federal regulation of interstate commerce." 667 F.2d at 309.

More damaging to the cities' position in the instant case is the action taken by the Supreme Court in *Donovan v. San Antonio Metropolitan Trans. Auth.*, —— U.S. ——, 102 S.Ct. 2897, 73 L.Ed.2d 1309 (1982). In that case, the district court held that local public mass transit systems constitute integral operations in areas of traditional government functions under *National League* and, therefore, the Secretary of Labor cannot enforce the minimum wage and overtime provisions of the FLSA against local public mass transit systems. *San Antonio Metropolitan Trans. Auth. v. Donovan*, Civ. No. SA-79-CA-457 (W.D. Tex. Nov. 17, 1981). The government appealed the decision directly to the Supreme Court pursuant to 28 U.S.C.A. § 1252 (1979). The Supreme Court vacated the district court's judgment and remanded the case "for further consideration in light of *United Transportation Union v. Long Island R.R. Co.*, 455 U.S. ——, 102 S.Ct. 1349, 71 L.Ed.2d 547 (1982)." —— U.S. at ——, 102 S.Ct. at 2897, 73 L.Ed.2d at 1309. By implication therefore, the Supreme Court considers *Long Island R.R.* of critical importance to the disposition of this issue.

Summarizing the holding of *National League*, the *Long Island R.R.* Court stated that the

> emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulations. Rather it was meant to require an inquiry into whether the federal regulation affects basic State prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its "separate and independent existence."

—— U.S. at ——, 102 S.Ct. at 1354-55, 71 L.Ed.2d at 554 (*quoting National League*, 426 U.S. at 851, 96 S.Ct. at 2474). Despite the intimations to the contrary, however, the *Long Island R.R.* Court found it extremely difficult to overlook the "historical reality" that operation of railroads have traditionally been performed by private industry. *Kramer*, 677 F.2d 308, 309.[8]

Historically, mass transit systems have been owned and operated by private companies. Public ownership is a fairly recent development. As late as 1960, 95% of local transit services were privately-owned and operated. H.R. Rep. No. 204, 88th Cong. 2nd Sess. *reprinted*, [1964] U.S. Code Cong. & Ad. News, 2569, 2590. By 1967 the shift from private to public ownership had accelerated to the point that over 50% of transit riders were carried by publicly-owned transit systems. *American Public Transit Association, Transit Fact Book* 55 (1978-79 ed.). By 1978 publicly-owned systems generated 90% of all total operating revenues, and carried 91% of all passengers conveyed by American transit. *Id.* Recent studies indicate, however, that between 45% and 52% of all transit operations in the United States are still privately-owned. U.S. Dept. of Transportation, Urban Mass Transportation Administration, *A Directory of Regulatory Scheduled, Fixed Route, Local Rural Public Transportation Service*, 6 (1980); U.S. Dept. of Transportation, Urban Mass Transportation Administration, *A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service*, 17 (1979). The recent conversion of mass transit systems from private to public ownership has been accomplished in many instances through the impetus of federal funding. The City of Augusta is a prime example. Finding the nation's transit systems in a state of deterioration, Congress enacted the Urban Mass Transportation Act enacted the Urban Mass Transportation

[8] *See, e.g., Long Island R.R.*, —— U.S. at ——, 102 S.Ct. at 1354, 71 L.Ed.2d at 554.

Act (UMTA) to provide massive federal financial assistance "to State and local governments and their instrumentalities in financing [transit] systems, to be operated by public or private mass transportation companies as determined by local needs." 49 U.S.C.A. § 1601(b)(3) (1976). Through UMTA, local governments with transit operations are eligible to receive up to 80% of capital outlays, including the cost of acquiring private systems and capital improvements, and up to 50% of operating expenses. 49 U.S.C.A. §§ 1603(a), 1604(e) (1976 & Supp. III 1979). The City of Macon acquired the assets of Bibb Transit Co. and took over operation of mass transit in Macon without the use of UMTA funds. Although contrary to the process through which Augusta acquired its transit system, this fact does not affect the result we reach today.

Like the Third Circuit, we are of the opinion that expanding state involvement in mass transit does not alter the historical reality of the fact that mass transit is not a function traditionally performed by the state or its subordinate political bodies. *Kramer*, 677 F.2d 308, 310. As explained in *Kramer*,

> the states are precluded from claiming, at this late date, that mass transit is a service which they traditionally provide. Tradition must be gauged in light of what actually happened, and what happened is a federal program of local transit service in which the state participate as late comer junior partners. There is, therefore, no tradition of the states *qua* states providing mass transportation. Moreover, since it is undisputed that the national government can set the employment relations in the area of mass transit, it would be unjustified to allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in this area.

677 F.2d at 310 (footnote omitted).

The evidence of "transit captive" citizens in Macon does not change our view. Although a small percentage of Macon's population require public transit, the overwhelming majority of Macon's inhabitants rely upon their own automobiles for transportation. The fact that mass transit is a necessity for a segment of the population does not mean that a municipality's providing of transit service automatically turns the service into a traditional function of government. Our result is not altered by the probability that private transit companies are "doomed to extinction," thus requiring local governments to shoulder the burden abandoned by the private sector. *See Kramer*, 677 F.2d 308, 310 n.1. As the statistics set out above indicate, local mass transit has historically been a function of the private sector.

When analyzed together, the similarities between the Long Island Railroad, the Macon Transit System and Augusta Transit Department reinforce our decision that the FLSA is constitutionally applicable to the plaintiff classes of bus operators. All three systems primarily involve the transportation of commuter passengers within an urban metropolitan area. Like the commuter train service of the Long Island Railroad, Macon and Augusta's transit systems had been privately-owned and operated for years. The Long Island Railroad was acquired by the Metropolitan Transit Authority in 1966; Macon and Augusta purchased existing transit operations in 1973. Based on the Supreme Court's analysis in *Long Island R.R.*, we hold that the services provided by the Macon Transit System and the Augusta Transit Department cannot be classified as traditional governmental functions. Federal regulation of both transit systems through the FLSA does not impair Macon's or Augusta's ability to function as a municipality nor "endanger [their] separate and independent existence." *Long Island R.R.*, —— U.S. at ——, 102 S.Ct. at 1355, 71 L.Ed.2d at 554 (*quoting National League*, 426 at 851, 96 S.Ct. at 2474).

C. *Severability*

The City of Macon contends that because *National League* held the overtime provisions of the FLSA inapplicable to certain state and local governmental employees, the overtime provisions are therefore inapplicable to all such employees in the absence of a congressional re-enactment of a constitutionally valid amendment to the FLSA. We disagree. As the district court correctly observed, *National League* did not entirely vitiate the 1974 amendments on minimum wage and overtime provisions. The amendments were found unconstitutional only "insofar as [they] operate to directly displace the state's freedom to structure integral operations in areas of traditional governmental functions . . . ." *National League*, 426 U.S. at 852, 96 S.Ct. at 2474. The Supreme Court recognized that the minimum wage and overtime provisions were still applicable to the states in areas which are not "integral parts of governmental activities." *National League*, 426 U.S. at 854 n.18, 96 S.Ct. at 2475 n.18. *See also Marshall v. City of Sheboygan*, 577 F.2d 1, 3-4 (7th Cir. 1978). We hold that the FLSA's severability clause controls here: "If any provision of this chapter or the application of such provision to any person or circumstance is held invalid, the remainder of this chapter and the application of such provision to other persons or circumstances shall not be affected thereby." 29 U.S.C.A. § 219 (1975). Therefore, no congressional re-enactment is necessary for a constitutionally valid application of the FLSA's overtime provisions to the public employees involved in these cases.

D. *Municipal Ordinance Claim in Alewine v. City Council of Augusta*

Because our holding recognizes that the plaintiff class of transit employees are due time and one-half overtime pay under the FLSA, we need not address the pendent municipal ordinance claim providing for a similar result

under the Augusta City Code. Suffice it to say here that equitable reduction of the proper amounts due is inappropriate under the federal statute. A dispute exists, however, as to the correct amount due.[9]

It is our opinion that justice would be best served by further inquiry into the contentions raised by Augusta's motion to amend, for it appears that a substantial miscalculation has occurred. If this is the case, it would be manifestly unjust to hold the City of Augusta to the terms of the original stipulation. The law of this circuit is that "a party may be relieved of a stipulation 'to prevent manifest injustice' so long as 'suitable protective terms or conditions are imposed to prevent substantial and real harm to the adversary.'" *Equitable Life Assurance Soc. v. MacGill*, 551 F.2d 978, 984 (5th Cir. 1977) (*quoting Laird v. Air Carrier Engine Serv.*, 263 F.2d 948, 953 (5th Cir. 1959)). On remand, the district court shall conduct further proceedings and, observing the guidelines quoted above, determine the correct recovery due under the overtime provisions of the FLSA.

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[9] At a hearing on cross motions for summary judgment, the parties stipulated to a document prepared by the City of Augusta concerning back overtime pay due each plaintiff should he or she prevail. The stipulated amount in the aggregate was $98,428.97. After the district court used this amount to award plaintiffs a partial recovery based on the municipal ordinance, the City of Augusta timely filed a motion to amend the judgment under Fed. R.Civ.P. 52(b), and, in the alternative, a motion for trial pursuant to Fed.R.Civ.P. 59. As grounds for the motion, the City of Augusta contended that the stipulated figure had been miscalculated by approximately $28,000. The affidavit of the City of Augusta's Director of Personnel, which is attached to the motion, states that the stipulated recoveries were inflated in that no credit was given for wages paid at straight-time rate between the forty and forty-eight hours intervals. According to the affidavit, the correct total in the aggregate is $70,225.19. The district court denied the motion.

III. CONCLUSION

Based on the above, we affirm the district court's entry of partial summary judgment in *Joiner v. City of Macon* holding that the City of Macon is not exempt from the overtime provisions of the FLSA with regard to the operation of the Macon Transit System. That case is remanded to the district court for further proceedings on the remaining issues. We reverse the summary judgment entered in favor of the City of Augusta in *Alewine v. City Council of Augusta.* That case is remanded to the district court for further proceedings consistent herewith.

AFFIRMED in part, REVERSED in part and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
S. D. GEORGIA
AUGUSTA DIVISION

Civ. A. No. 179-113

JIMMY ALLEN ALEWINE *et al.*,
Plaintiffs,

v.

CITY COUNCIL OF AUGUSTA, GEORGIA,
Defendant.

Jan. 13, 1981

Charles L. Wilkinson, III, Augusta, Ga., for plaintiffs.

Samuel F. Maguire, Augusta, Ga., for defendant.

MEMORANDUM OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

BOWEN, District Judge.

Plaintiff bus drivers, employees of the Transit Department of the City of Augusta, Georgia, filed their complaint on the 31st day of May, 1979, seeking to recover compensation for back pay alleged to be due them as overtime pay claimed under the maximum hours provisions of the Fair Labor Standards Act (29 U.S.C. § 201 *et seq.*) and under a section of the Ordinances of the City of Augusta (Augusta City Code § 2-48). The complaint is cast in one count and seeks relief under federal and state (city ordinance) law. Plaintiffs seek injunctive relief, back pay, attorney's fees and liquidated damages under the provisions of 29 U.S.C. § 217.

During the course of the litigation, the plaintiffs applied to the Court for a preliminary injunction seeking to restrain the city's implementation of a plan to reduce their work hours. An order was entered, after hearing and consideration of said application, on June 20, 1980.

Findings of fact have been made and necessary inferences have been drawn. The Court proceeds to dispose of the case not on summary judgment, but after the evidence has case has been tried without a jury and the evidence reaches the Court from the testimony, the record, and the parties' stipulation.

This memorandum is cast in six parts. First, the Court determines its jurisdiction to proceed. Second, there is a statement of facts found by the Court upon the stipulations by the parties. Third, there is a discussion and a statement of conclusions of law regarding the federal law claim of the plaintiffs. Fourth, there is a discussion and a statement of conclusions of law made regarding the pendent jurisdiction state law claim. Fifth, there is a discussion and a statement of findings with respect to the plaintiffs' recovery. Last, there is an order according some of the relief sought by the plaintiffs and the defendant.

Both the plaintiffs and the defendant have filed motions for summary judgment. This opinion and order disposes of the case on the merits. The Court has heard testimony and received evidence in the case on a prior application for preliminary injunction. The Court has considered the pleadings, the briefs, and the affidavits submitted by the parties. Most importantly, the Court has considered the detailed stipulation of facts which able counsel for the parties have presented. The case is not one of factual dispute. The lawyers have handled the case vigorously, but unemotionally. They have succeeded in an effort to present the facts of the case to the Court in a well organized, impartial, and meaningful way. In some litigation, there is great need for heated pursuit of

minor factual matters. In this case, however, the parties, the public, the Court, and the interest of justice and proper advocacy have been best served by this simple, direct approach to the facts. Counsel are to be commended for their presentation in this regard. However, their agreement to the facts has never diminished the zeal with which counsel have approached the legal issues. The case has been aptly briefed and argued. It is thoroughly before the Court.

JURISDICTION

There is no dispute between the parties as to the Court's jurisdiction in this case. With respect to the federal law cause of action, this Court has jurisdiction under the provisions of the Fair Labor Standards Act, 29 U.S.C. § 216(b) and under the provisions of 28 U.S.C. § 1331. Venue is proper in the Augusta Division of the Southern District of Georgia where the claim arose. 28 U.S.C. § 1391(a).

With respect to the state law claim made by the plaintiffs grounded in the city ordinances of Augusta, the facts which control are identical to those presented under the federal claim. The parties are the same and the interest of judicial economy is served by this Court's determination and disposition of that claim. The Court may therefore decide the state law claim under the doctrine of pendent jurisdiction. This doctrine provides that a federal court has the discretionary constitutional power to hear a state law claim if it arises out of the same nucleus of operative facts as plaintiffs' federal claim. *Tower v. Home Construction Co.*, 625 F.2d 1161 (5th Cir. 1980); *Curtis v. Taylor*, 625 F.2d 645 (5th Cir. 1980); *United States v. Capeletti Brothers, Inc.*, 621 F.2d 1309 (5th Cir. 1980). Here, the federal and state law claims clearly arise out of the same nucleus of operative facts.

THE FACTS

Plaintiffs are present or former employees of the City Council of Augusta, Georgia (hereinafter "the City"), who, at the time of the filing of the complaint, were working or who had worked within the preceding three years as bus drivers for the City Council of Augusta, Georgia. Plaintiff Francis H. Stafford was an employee in the housekeeping section of the Transportation Department. Her claim has been withdrawn by stipulation of counsel.

The City Council of Augusta is the governing body of the City of Augusta, Georgia, and is subject to the jurisdiction of this Court. The City of Augusta was chartered by the legislature and is a political subdivision of the State of Georgia.

The Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, *et seq.*, provides for minimum wages to be paid and limits the hours which can be worked by covered employees during a workweek. Section 207 provides for the maximum hours which certain employees can work during a work-week and provides for overtime pay above the maximum hours. Originally the provisions of the Fair Labor Standards Act exempted employees of street car, trolley, and motor bus carriers from the application of the minimum wage and maximum hours provision. The 1966 amendments to the Fair Labor Standards Act, Pub. L. No. 89-601, extended the maximum hours coverage to non-operating employees of transit systems and extended minimum wage coverage to all transit employees.

Effective May 1, 1974, the maximum hours exemption for operating employees of transit systems contained in 29 U.S.C. § 213(b)(7) was repealed in two stages. On May 1, 1974, they were to be paid overtime compensation for hours worked in excess of forty-eight hours per week; beginning May 1, 1975, such employees were to be paid

overtime compensation for hours worked in excess of forty-four hours per week; and beginning May 1, 1976, they were to be paid overtime compensation for hours worked in excess of forty hours per week; 29 U.S.C. § 207 requires employees to be paid time and one-half for all hours worked in excess of forty hours in any one work-week.

Section 2-48 of the Code of the City of Augusta, Georgia, 1972, as amended, pages 177-178, provides as follows:

> The number of hours of work to be observed by any employee in any department of the City Council, except the departments under the control and jurisdiction of the Civil Service Commission of the City, and except all employees of the City Council engaged in the paving, macadamizing, or otherwise improving for travel the streets and alleys of the City, or in connection with the curbing and guttering of such streets and alleys, shall not exceed forty hours per work week. The term "work week" shall mean a calendar week. This section shall not be construed as a reduction of the salaries and wages of any of the present or future employees of the City Council.
>
> It shall be lawful for any City official, the Mayor, the committee superintendent, foreman, or other person directing an employee to require an employee to proceed with any duties in excess of such forty hours per work week in case of an emergency and only in such event. However, when an emergency has ended, such time devoted by such employee in excess of a forty hour work week shall be allowed the employee as overtime with time and one-half pay.
>
> The term "employees" as used in this section, shall mean the employees covered or hereafter covered by the Officers and Employees Tenure Act of 1937-38, as amended. Each of such employees employed by

> the day, now or in the future, shall be paid, when he has worked forty hours in any work week his daily wages for six days, whether such forty hours work is in six days or less. Each of such employees working in any work week, now or in the future, less than forty hours, shall be paid on a time basis of the number of hours worked, as such time is in proportion to the time calculated for an employee who worked forty hours in the calendar week. (Code 1952, Ch. 2, Section 32)

On December 21, 1979, the Secretary of Labor published a regulation in the Federal Register, 44 Fed. Reg. 75630 (Dec. 21, 1979), declaring municipal transit bus systems to be within the "non-traditional" classification of municipal activities, within the meaning of *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976).

Prior to 1950, local bus service in Augusta was provided by the Georgia Power Company. In 1950, the Augusta Coach Company, a privately owned corporation, began operating local bus service in Augusta under a francise from the City.

As shown by financial statements for the years 1968 through 1972, of record in this case, the Augusta Coach Company experienced a steady decrease in net income and working capital. The financial situation of the Augusta Coach Company steadily deteriorated until, in 1969, its Board of Directors notified the City of Augusta of their intention to discontinue service. The financial situation of the Augusta Coach Company continued to deteriorate, and early in 1973, the Augusta Coach Company again informed the City of Augusta of its intension to discontinue service.

The City Council of Augusta executed a six-month option to purchase assets of the Augusta Coach Company in April, 1973. For six months, the City Council pro-

vided operating assistance to the company while an application for federal assistance was processed.

The Augusta Coach Company made several attempts to remain profitable: it discontinued service to North Augusta, South Carolina, in 1964; it discontinued Sunday service and curtailed charter service in 1972; it deferred capital expenditures, such as the purchase of new buses; it deferred pay raises to employees and it was allowed to operate without a franchise.

The average age of each bus in the fleet of buses owned by the Augusta Coach Company in 1973 was approximately 19 years. The buses generally were not mechanically reliable and often broke down in every day service. None of the buses were air conditioned.

The assets of the Augusta Coach Company were purchased with federal assistance by the City Council of Augusta by a "Letter of No Prejudice" dated November 7, 1973. The City Council of Augusta began operating the Augusta Transit Department on November 21, 1973. The City Council of Augusta made application to the Urban Mass Transportation Administration for capital assistance and operating grants. Said application was approved in January, 1975, and a grant contract was executed on January 30, 1975.

On January 10, 1975, the Urban Mass Transportation Administration offered the City a grant contract, which the City accepted on January 30, 1975; a copy of said Urban Mass Transportation Administration Capital Grant Contract between the City and the United States of America, Project Number GA-03-0004, the terms and conditions of that contract, a letter of certification from the Department of Labor to the Urban Mass Transportation Administration dated October 16, 1974, which is incorporated into said grant contract by reference, the Agreement between the City, the Municipal Employees Association, and the Amalgamated Transit Union, dated October

3, 1974, and incorporated into said grant contract by reference, are of record in this case.

In the Agreement between the City, the Municipal Employees Association, and the Amalgamated Transit Union, dated October 3, 1974, of record in this case, the City agreed that there would be no "worsening" of employees' position with respect to their employment. This agreement was required by the provisions of the Urban Mass Transportation Act of 1964, 49 U.S.C. §§ 1601, 1609(c).

Prior to the City's purchase of the assets and the rolling stock of the Augusta Coach Company, the City did not provide bus service.

The Augusta Transit Department of the City Council of Augusta provides fixed route, scheduled bus service and charter service. The bus service offered by the City Transit Department is similar to the service that was being provided by the Augusta Coach Company at the time of public takeover.

The quality of equipment has greatly improved. Had it not been for the grant from the Urban Mass Transportation Administration, the City would not have purchased the assets of the Augusta Coach Company. Were it not for the operating grants from the Urban Mass Transportation Administration, the City would not pay the cost of operating the local transit system.

After purchasing the assets of the Augusta Coach Company, the City hired the drivers and non-operating personnel employed by the company. The functions and duties of the newly hired personnel remained about the same as before.

The City charges bus riders a fee for regular bus service. Since acquisition by the City, the bus service has frequently contracted with private businesses and groups to provide private charter service.

Neither plaintiffs, nor other transit employees, are under the management of the Civil Service Commission

(Police and Fire departments) of the City. In operating a bus service, the City engages in an activity previously engaged in by a private enterprise.

Since May 1, 1976, the City has paid overtime pay to the bus drivers only for hours they worked in excess of forty-eight hours a week; the City pays the mechanics in the Transit Department overtime after forty hours a week. Under this Court's order of June 20, 1980, the City has implemented a plan which reduced the bus drivers workweek to approximately 40 hours. Both the forty-eight hour workweek and the present week have been designed around the time required to make certain scheduled "runs" of bus service.

The State of Georgia does not require that by statute a municipal corporation provide bus service to its citizens.

The following chart shows the operating expense, revenue-fares, revenue-other and total revenue for the City Council of Augusta Transit Department for the years 1973 through 1978:

Year	Operating Expense	Revenue-Fares	Revenue-Other	Total Revenue
1973	$226,482.83	$110,392.71	$ 55.10	$110,447.81
1974	598,287.34	432,980.54	2,720.67	435,701.21
1975	669,807.93	440,638.58	1,252.78	441,891.36
1976	731,512.06	440,669.10	864.89	441,533.99
1977	858,846.61	421,925.77	675.11	442,600.88
1978	994,606.27	431,495.66	8,098.00	439,593.66

For the years 1973 through 1978, the following chart shows the Federal Government's participation in operating costs and net operating loss for the City Council of Augusta Transit Department:

Year	Federal Government Participation	Net Operating Loss
1973	$ —	$116,035.02
1974	—	162,586.13
1975	—	257,916.57
1976	86,269.00	203,709.07
1977	—	436,245.73
1978	347,839.00	207,173.61

The Federal Government's involvement, through the Urban Mass Transportation Administration, is extensive. The Federal Government absorbs 50% of the system's operating loss.

The capital outlays from the City's State Street Maintenance Account, Government (Federal) participation capital account and net capital cost for the Transit Department for the years 1973 through 1978 are as follows:

Year	State Street Maintenance Acct.	Federal Government Participation Capital Acct.	Net Cost Capital Acct.
1973	$ —	$ —	$ —
1974	476,140.16	—	476,140.16
1975	787,048.08	1,050,331.05	263,282.97
1976	76,304.32	980.20	53,938.52
		21,385.60	
1977	566,021.66	407,547.20	153,764.14
		4,710.32	
1978	605,162.40	491,726.46	113,435.94

For the years 1973 through 1978, the City Council of Augusta Transit Department had an annual ridership of approximately 1.9 million persons.

In fiscal year 1978, Transit Department operating expenses totaled $998,503, while the Department produced $432,418 in operating revenues from bus service. The deficit in fiscal year 1978 between operating expenses and operating revenues was paid by Federal funds in the amount of $283,042 from Federal funding sources, and $283,043 in City funds.

According to a recent survey conducted by the Augusta-Richmond County Planning Commission, 86% of the riders of the Augusta Transit Department belong to households without a car or with only one car.

Bus service in Columbia and Charleston, South Carolina, is provided by the South Carolina Electric and Gas Company. South Carolina Electric and Gas Company is a privately owned corporation.

The cities of Columbia and Charleston, South Carolina, are larger in population than is the City of Augusta. The counties of Richland and Charleston, South Carolina, in which are located the cities of Columbia and Charleston, respectively, are larger in population than is Richmond County, Georgia.

The public transit systems in the following major cities in Georgia are now owned and operated by local governments: Atlanta, Athens, Macon, Columbus, Savannah, Rome, Albany and Augusta.

In the following five stipulations, the term "Publically owned Transit Systems" refers to systems owned, operated or subsidized in major part by local, state or federal governments, and includes transit systems operated or managed by private firms under contract to governmental agency owners. According to the American Public Transit Association's *Transit Fact Book*, in 1978, in the United States,

> (a) 90% of the total operating revenues generated by metropolitan transit systems were generated by publically owned transit systems,
>
> (b) publically owned transit systems accounted for 89% of all vehicle miles operated in the transit industry,
>
> (c) publically owned transit systems had 91% of all "linked passenger trips" in the transit industry,
>
> (d) publically owned transit systems owned or leased 84% of the total motor buses owned or leased by the United States transit industry, and
>
> (e) publically owned transit systems accounted for 48% of al transit systems nationwide.

A copy of the 1979 American Public Transit Association's *Transit Fact Book* is of record in this case.

FEDERAL LAW CLAIMS

The plaintiffs' complaint as it relates to claims under federal laws involves both the Fair Labor Standards Act (29 U.S.C. § 201 *et seq.*) and the Urban Mass Transit Act (49 U.S.C. § 1609(c)). This Court is guided by a number of recent federal appellate decisions with respect to the interpretation of these statutes.

Over 40 years ago, the Congress of the United States enacted the Fair Labor Standards Act. The Act required covered employers to pay their employees minimum wages plus overtime pay at increased rates for time in excess of a maximum-hour workweek. The Supreme Court of the United States unanimously upheld the Fair Labor Standards Act as a valid exercise of congressional authority under the Commerce Clause of the Constitution in *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941), observing: "whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause." *Id.* at 115, 61 S.Ct. at 457.

The original Fair Labor Standards Act passed in 1938 specifically excluded from coverage the states and their political subdivisions. However, in a series of amendments beginning in 1961, Congress began to extend the coverage provisions of the Act to some types of public employees. This series of amendments culminated in the 1974 amendments which are the most recent in the series of broadening amendments to the Fair Labor Standards Act. By the 1974 amendments, Congress has extended the minimum wage and maximum hour provisions to almost all public employees employed by the states and their political subdivisions. The constitutionality of this vast extension of the coverage of the Act under the 1974 amendments was tested in the case of *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed. 245 (1976), in which the Supreme Court provided to the

lower courts some guidance and few specifics as to the unconstitutionality of the coverage broadening 1974 amendments to the Fair Labor Standards Act.[1]

Briefly, the Court reasoned that while Congress may have plenary power under the Commerce Clause[2] to regulate commerce, and that the Fair Labor Standards Act was a legitimate exercise of this authority, it may not effect legislation which attacks the integrity or the very sovereignty of the states as states. Recognizing that independent sovereign states are necessary to the maintenance of the union in a federal system envisioned by the Constitution, the Court determines that even the plenary grant of authority to legislate contained in the Commerce Clause must yield to the right of the states to structure their own agreements with employees engaged in integral government functions. The Court gave examples of integral government functions such as fire prevention, police protection, sanitation, public health, and parks and rec-

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[1] Incidentally, the 1974 amendments also eliminated the exemption from coverage under the Act for operator employees of motor bus and trolley carriers.

As stated earlier, the FLSA 29 U.S.C. § 213(b)(7) excludes bus drivers from coverage. By the 1974 amendments to the Act, the exemption clause was repealed, effective May 1, 1976. It should be noted that the plaintiffs would be entitled to a forty hour workweek if they were employed in private industry. The Court views this only incidentally, and has concluded elsewhere that this fact does not amount to a "worsening" of conditions of employment.

This case deals with the status of the plaintiffs as employees of a political subdivision of the State of Georgia, and not as employees of a private motor bus or trolley carrier. The elimination of that coverage exemption is of interest, but of importance only in considering the plaintiffs' contention with respect to the Urban Mass Transit Act and the "worsening" of their employment conditions.

[2] Article 1, Section 8, Clause 3 of the United States Constitution grants to the Congress the power ". . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes . . . ."

reation, and noted that "these examples are obviously not an exhaustive catalog of the numerous line and support activities which are well within the area of traditional operations of state and local governments." 426 U.S. at 851 n.16, 96 S.Ct. at 2474. The Court ultimately concluded: "we hold that insofar as the challenged amendments operate to directly displace the states' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Article I, Section 8, Clause 3." *Id.* at 852, 96 S.Ct. at 2474.

Further, the Supreme Court specifically overruled its decision in *Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968) and recognized that although ". . . there are obvious differences between the schools and hospitals involved in *Wirtz*, and the fire and police departments affected here, each provides an integral portion of those governmental services which the states and their political subdivisions have traditionally afforded their citizens." *National League of Cities v. Usery*, 426 U.S. at page 855, 96 S.Ct. at page 2476. Thus, the Supreme Court has added schools and hospitals to the examples of other traditional operations of state and local governments.

Quite simply put, the main issue before this Court on the plaintiffs' federal law claim is whether the operation of an urban transit department by the City of Augusta (a political subdivision of the State of Georgia) is an integral operation in an area of traditional governmental function. If so, the Fair Labor Standards Act provisions cannot apply to this case to reduce the workweek of the drivers to 40 hours. If not, the Transit Department and all of its employees are subject to all provisions of the Act.

In *National League of Cities*, the Supreme Court did not provide specific definitions of the words "integral" and "traditional" as they are used therein. While this

may be regretable for city and state administrators in attempting to ensure that the activities of their operations comply with the Constitution and the acts of Congress, the resulting flexibility afforded to courts in molding relief under the opinion, according to the facts of the cases arising, may be beneficial. A determination of whether an activity or operation of a state or a city is integral and one of traditional governmental function involves an interpretation of those terms and their construction in light of the facts. Thus, a conclusion thereon is mixed of law and fact.

Several courts have interpreted the *National League of Cities* decision. The esteemed Second Circuit Court of Appeals commented at length on *National League of Cities* in *United Transportation Union v. Long Island Railroad Company*, 634 F.2d 19 (1980). In that case, the Second Circuit noted the absence of a precise definition of the key words but found solace in the fact that the Court had given several examples of integral operations of traditional governmental functions. In holding that the Long Island Railroad Company was not subject to federal regulation, the court observed that a traditional governmental function need not be one always provided by government. I interpret their holding to mean that integral operations of governmental functions may become traditional, or less so, depending on the change of times and the needs of a developing society.

In *Amersbach v. City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979), the Sixth Circuit Court of Appeals determined that Cleveland's operation of a municipal airport amounted to an integral traditional government function within the ambit of *National League of Cities*. The *Amersbach* court suggested a four-prong test[3] noting

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[3] The *Amersbach* court noted:

(1) the government service or activity benefits the community as a whole and is available to the public at little or no direct expense;

[Footnote continued on page 38a]

certain elements common to each of the examples given by the Supreme Court. However, I do not conclude that the application of the *Amersbach* test in strict form should be dispositive of this case.

The first element of the *Amersbach* test requires a finding that the service is available to the public at "*little or no direct expense.*" This element of the test seems to be contrary to its application to at least one of the examples mentioned by the Supreme Court. Hospital services are seldom, if ever, available to the general public at little or no direct expense. If the *Amersbach* test were applied strictly in this case, it would fail upon the finding that the riding public pays approximately one-half of the expense of the transit operations of the City of Augusta. While the payments by the riders are small, they are direct, and they are not so insignificant as to amount to "little or no direct expense". I do not consider the *Amersbach* test to be conclusive in this case, nor that it should be strictly applied in any case. Obviously, it was correct for application to the municipal airport of Cleveland, but it need not be strictly applied here.

While the Supreme Court has provided no definition of "integral" or "traditional" and while the *Amersbach* and *Long Island Railroad* decisions are not directly on point with the operation of a city transit department, a decision must be made. The foremost exponent of "tradition" known to this Court is Tevye.[4] Even that source has been

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[3] [Continued]

(2) the service or activity is undertaken for the purpose of public service rather than for pecuniary gain;

(3) government is the principal provider of the service or activity; and

(4) government is particularly suited to provide the service of a communitywide need for the service or activity.

[4] Tevye, of course, is the main character in the musical play *Fiddler on the Roof* by Joseph Stein, Jerry Bock and Sheldon

[Footnote continued on page 39a]

studiously researched along with several *Websters*. In my opinion, none of these sources envision "tradition" or "traditional" in quite the way that the Supreme Court did in *National League of Cities*. Thus, I cannot conclude that traditional government functions must be those which are time honored, hoary, or historic. Integral operations of traditional government functions may be those which the public has come to expect and demand in light of the change of times and needs of society. Here, the city's operation of the transit department benefits the community as a whole, is available to the public at small cost, is undertaken for the purpose of public service rather than pecuniary gain, and government is the principal provider of the service and is particularly suited to provide the service. There is an obvious community wide need for the service. Accordingly, within the view of the *National League of Cities* case as I interpret the terms from the usage of the Supreme Court, the operation of the City Transit Department of Augusta is an integral operation of traditional governmental function.

Because of the application of equitable principles elsewhere in this memorandum, it should be noted that this case is not an easy one. It presents a very complex question to the district court. The conclusions are not facile,

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Harnick. In the prologue, Tevye, the religious but poor dairyman, defines "tradition" at least as well as the Supreme Court has done: "And how do we keep our balance? That I can tell you in a word—tradition! Because of our traditions, we've kept our balance for many, many years. Here in Anatevka we have traditions for everything—how to eat, how to sleep, how to wear clothes. For instance, we always keep our heads covered and always wear a little prayer shawl. This shows our constant devotion to God. You may ask, how did this tradition start? I'll tell you—I don't know! But it's a tradition. Because of our traditions, everyone knows who he is and what God expects him to do."

(Enter the villagers, singing)

"Tradition, tradition—tradition.
Tradition, tradition—tradition."

nor is there a wealth of authority to guide the Court's decision. Skilled lawyers have legitimately different opinions derived after hours of careful research. It is difficult to imagine that city or state administrators, even those skilled in the law, could make a meaningful, correct determination as to whether their operations are covered by the Fair Labor Standards Act without litigation. This is due to the fact that the Supreme Court has employed euphemism in its opinion, but to the flexibility of its decision which must be judicially applied to fit the circumstances of a given case. In short, it is unreasonable to demand perfection of those charged with a decision when the choices are as vague and obscure as presented here.

With the resolution of the integral operation of traditional governmental function question, other issues involving the application of federal law and principles arise. The Court concludes that the defendant has not waived any immunity, or contracted away its right to challenge the constitutionality of the Fair Labor Standards Act by accepting grants from the Urban Mass Transit Administration.

The *National League of Cities* opinion does not suggest that federal financial involvement or support to any state activity has bearing upon the right of a state or political subdivision to challenge an unconstitutional act of Congress. After *National League of Cities*, it is clear that fire prevention, police protection, sanitation, public health, parks and recreation, and school and hospital operations are not subject to the application of the Fair Labor Standards Act. It is a truism to state that federal involvement by financial assistance in the aforementioned "traditional" governmental functions is massive. For example, the federal government assists local government with traditional governmental functions by financial aid as follows:

Police: Omnibus Crime and Safe Streets Act of 1968, 42 U.S.C. § 3701, *et seq.*

Fire: Federal Fire Prevention and Control Act of 1974, 15 U.S.C. § 2201, *et seq.*

Education: Elementary and Secondary Education Act of 1965, 20 U.S.C. § 2701, *et seq.*

Public Health/Hospitals: Public Health Service Act, 42 U.S.C. § 201, *et seq.*

Parks and Recreation: Housing and Community Development Act of 1974, 42 U.S.C. § 5301, *et seq.*

Sanitation: Safe Drinking Water Act, 42 U.S.C. § 300f, *et seq.*; Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.*

Also, there is the generalized federal aid program to state and cities known as "revenue sharing".

All of the aforementioned federal assistance to local government programs were created by statutes in effect on the date of the *National League of Cities* opinion. It would be illogical to conclude that the mere acceptance of federal aid could be the basis of a waiver of immunity or the right to challenge the unconstitutionality of an act of Congress.

More specifically, however, the City of Augusta has accepted federal money from the Urban Mass Transit Administration. In order to obtain the federal aid, the City has applied for grants and has signed agreements under section 13(c) of the Urban Mass Transit Act, 49 U.S.C. § 1609.[5]

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[5] 49 U.S.C. § 1609 provides in pertinent part: "It shall be a condition of any assistance under section 3 of this Act . . . to protect the interests of employees affected. . . . Such protective arrangements shall include, without being limited to, such provisions as may be necessary for . . . the protection of individual employees against a worsening of their positions with respect to their employment.

While Congress could have chosen between such words as "deterioration", "diminution" and others, it chose to use the curious

[Footnote continued on page 42a]

The city of August has executed an agreement with the Urban Mass Transit Administration under section 13(c) of the Urban Mass Transit Act. This is commonly known as a 13(c) agreement. The plaintiffs have argued that the 13(c) agreement requires the payment of overtime compensation under the Fair Labor Standards Act. The plaintiffs reason that the failure to require such payment amounts to "a worsening" of their conditions of employment. There is little authority on this point. Here, the employees now enjoy far greater job security. Also, they have received several pay raises. They are City employees and have tenure under the City ordinances. When the City took over the transit operation, the drivers workweek remained the same, 48 hours. It is true that had the Augusta Coach Company remained in business, the workweek of the drivers would have been reduced by the Fair Labor Standards Act to 40 hours in 1976. However, this is speculation in which the Court shall not engage.

It is clear that the conditions of employment for the plaintiff bus drivers are now equal to or better than those which existed when they worked for the Augusta Coach Company. Whether conditions of employment for employees protected by a 13(c) agreement have undergone "a worsening" is one of reasonable comparison.

In realistic terms, it appears that the working conditions of the bus drivers employed by the City of Augusta are better than those which existed during their employment by the Augusta Coach Company. Certainly, it would be error to conclude that the conditions of em-

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term "worsening". It appears, through lack of any other precise definition of the term, that "worsening" presumes that things were already bad before they worsened. Apparently, the Urban Mass Transit Act proscribes any act which makes employment conditions worse than they were. Worse is a comparative term. As compared to some other convoluted language we observe in federal statutes, the tortured genesis of "worsening" as a noun is not the worst ever. To adopt the congressional idiom, it should not be referred to as "better" than some; perhaps it is simply less worse.

ployment of the bus drivers of the City of Augusta had, in fact, deteriorated since their employment by the City.

STATE LAW CLAIM

Plaintiffs' complaint alleges a cause of action against the defendant City under state law. The Court has already determined its jurisdiction with respect to the state law claim. A claim alleging the violation of a right created by city ordinance is cognizable as a cause of action under state law. *City Council of Augusta v. Kelly*, 53 Ga.App. 589, 186 S.E. 222 (1936).

Here, the plaintiffs as city employees are entitled to benefit from the rights created by an old ordinance of the City of Augusta, which, in general terms, establishes the same maximum hour limitations as plaintiffs have sought to impose in this case under the Fair Labor Standards Act. The ordinance is direct and specific, and its language is unambiguous. The ordinance, which is quoted in the "facts" portion of this memorandum, covers all city employees who are not specifically exempted by its terms.

The defendants have argued that the plaintiffs are exempt from the provisions of the overtime ordinance because it has been utilized in the past only to award compensatory time to overtime employees, and because the plaintiff bus drivers "are engaged in the paving . . . or otherwise improving for travel the streets and alleys of the city" because the performance of their duties relieves traffic congestion and reduces air pollution.

Whether or not the ordinance has been used to pay overtime rates or to award compensatory time to other employees in other departments of the city is irrelevant to this dispute. Compensatory time allocations have not been used in the Transit Department nor has the allocation of such time become a part of any tacit or express agreement between the City and the bus drivers. The bus drivers have been regularly paid overtime in excess of the

forty-eight hour week which was adopted upon the City's takeover of the Augusta Coach Company. The language of the ordinance is clear. It provides for payment of overtime wages at the rate of 1 and ½ times the regular rate. Thus, the "comp time" argument urged by the defendant is to no avail.

The argument that the bus drivers are exempt from the overtime pay provisions of the ordinance because of the fact that their services reduce traffic congestion and air pollution thus "improving for travel the streets and alleys of the City of Augusta" is disingenuous at best. Such an interpretation of the clear language of the ordinance requires elasticity of logic and agility of linguistic ability this Court does not possess. The bus drivers do not fall within the categories of exempted city employees.

The essence of the case with respect to the state law claim is that some recovery is required. The quoted ordinance is the duly enacted law within the sphere of operations of the City of Augusta. City employees are entitled to its observance, no more nor any less. While there may have been active or acquiescent nonobservance of the ordinance from time to time, by particular City departments, the ordinance is law and remains so. There can be no tacit repeal of the ordinance by actions of the Mayor, the transit committee of council, or council members acting individually. The repeal of the city ordinance and the rights which it confers upon city employees could only be accomplished by the duly elected mayor and council of the City of Augusta acting in accord with the terms of the city charter. No such repealer has been enacted.

The Supreme Court of Georgia spoke authoritatively to this proposition in 1894 in *Harper v. Mayor of Jonesboro*, 94 Ga. 801, 22 S.E. 139 (1894). "The passage of an ordinance is a legislative act, accompanied with a certain degree of formality, and, . . . no change can be made in such an ordinance except by the passage of another, qualifying, repealing, or modifying its terms." *Id.* at 803, 22 S.E. 139.

Until some act of equal dignity to the enactment of the quoted ordinance takes place, the ordinance remains in full force and effect. The ordinance may not be repealed, modified, altered, amended, or changed in any way by acquiescense of the mayor and council members or by agreement between the city employees individually with the mayor and members of council, or other city employees.

Thus, it seems that the bus drivers, as city employees, are entitled to a 40-hour workweek and are entitled to receive the rate of 1 and ½ times their regular wage for hours worked in excess of 40 hours per week. With respect to the city ordinance, this conclusion is inescapable. The only time to be included under the ordinance dictated forty-hour workweek is that spent on regular, scheduled runs or required charter trips. The workweek calculation should exclude time spent on charter trips for which drivers volunteer.[6] The ordinance does not speak to this point, but this is the only reasonable interpretation.

PLAINTIFFS' RECOVERY

The Court has determined that the plaintiff bus drivers are entitled to recover from the defendant upon their state law claim. No recovery is permitted with respect to

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[6] The Fair Labor Standards Act specifically excludes charter trip time. The pertinent language of 29 U.S.C. § 207(n) is "In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment."

their federal law claim. The next question then is as to the amount which each employee should recover.

For this state law claim, there is no statutory provision providing for liquidated damages similar to those which are afforded in certain circumstances under the Fair Labor Standards Act, 29 U.S.C. § 217. Under Georgia law, the award of attorney's fees to a prevailing party is permitted only under carefully defined circumstances. Similarly, punitive damages, liquidated damages, or other types of penalties are permitted only when authorized by statute. Here, the right to recover, or cause of action, is created by city ordinance and there is no statutory provision authorizing the collection of attorney's fees, punitive damages, liquidated damages or penalty by the successful plaintiff.[7] Accordingly, no damages in addition to the back pay amounts due the plaintiffs can be recovered by them or on their behalf.

During the course of this litigation, counsel for both parties have exhibited admirable zeal in the representation of their clients and in their responsibilities to the Court and the public in general. Counsel have made stipulations which have established most of the facts found by the Court. Additionally, counsel have stipulated the back pay amounts which would be due to the individual party plaintiffs in the event of their recovery. This stipulation of amounts with respect to each employee has been filed with the Court and made a part of the record in this case. The parties, thereby, have relieved the Court of the laborious task of calculating damages in the case of

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[7] Under Ga.Code § 20-1404, the expenses of litigation are not generally allowed as a part of the damages unless the defendant has acted in bad faith or has been stubbornly litigious. There is no evidence here of bad faith on the part of the defendant. Ga.Code § 20-506 allows attorney's fees in cases involving written evidence of indebtedness, and as such, is not applicable here. Ga.Code § 20-1405 prohibits the award of exemplary damages in contract cases. Otherwise, punitive damages are available in tort actions only under §§ 105-2002 and 105-2003.

each of the individual plaintiffs. Counsel are to be commended for this endeavor.

The city ordinance is glaringly explicit. However, the city administration has historically used this ordinance to allocate compensatory time to its employees. The city has always maintained a forty-eight hour workweek for its bus driver employees prior to the inception of this litigation. This practice was held over from the prior operation of the Augusta Coach Company. The city bus drivers have received several raises since the Transit Department was organized and the city began its transit operations. The working conditions of the drivers has not undergone "a worsening" as that term is contemplated in the Urban Mass Transit Act. For years, the drivers were apparently content with their agreement and the practice of the forty-eight hour workweek. There is no evidence that the city administration has willfully or intentionally deprived its bus driver employees of any right created by ordinance. Instead, the failure to accord its bus drivers employees with the same maximum hours enjoyed by other city employees seems to be the result of inadvertence, misdirected attention to similar provisions of the Fair Labor Standards Act, and the urgent needs of the Transit Department.

While the employees' agreement to the forty-eight hour workweek cannot be construed to abrogate the city ordinance requirement of a forty-hour workweek, the special factual situation that this case presents should be thoroughly considered. Here, the City took over a business operation, not formerly subject to the overtime provisions of the Fair Labor Standards Act, where the ordinary workweek was 48 hours. This forty-eight hour workweek was not designed to be oppressive or exploitive. It was designed around the drivers' average daily run. Moreover, it should be remembered that the plaintiffs, after the inception of this litigation, strenuously protested the reduction of their forty-eight hour workweek by the

City. They cited extreme financial hardship as the only possible result from the City's action. Also, the drivers actively seek charter runs in addition to their regular runs. The Court has already observed that it would be difficult and improbable, if not impossible, for City administrators of ordinary skill and experience to apply with certainty the provisions of the Fair Labor Standards Act in light of the *National League of Cities* opinion. It is easy to see how the attention and concern of City administrators and council members could have been quite honestly misdirected to the question of coverage under the Fair Labor Standards Act and the imagined impact that would have. Apparently, that concern and attention has been to the exclusion of thorough consideration of the City ordinances themselves.

This is a case for the application for equitable principles. The background of the city's entry into the transit operations, the delay in bringing the question to the forefront of the city's consideration, the good faith of all the parties, and the fact that the arrangement between the city and the employees had worked smoothly for a considerable period of time, and other special facts observed by the Court make it unconscionable to award to the plaintiffs the total amount which they seek to recover in this case. Here the Court sits as trier of fact as well as the judge of the law. Under the state law claim, a jury could return a general verdict. This Court has determined the facts under the parties' factual stipulation and the judgment to be entered by the Court must be responsive both to the law and all of the facts of the case. Accordingly, the award to the bus driver plaintiffs under their state law claim shall be in an amount equal to 66⅔% of the maximum recovery which has been stipulated by the parties.

APPENDIX C

CONSTITUTIONAL PROVISIONS AND STATUTES

1. The Constitution of the United States provides in pertinent part:

Article I, Section 8:

> The Congress shall have Power
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> * * * * *
>
> To regulate Commerce * * * among the several States * * *;
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> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department of Officer thereof.

Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

2. The Fair Labor Standards Act of 1938, 29 U.S.C. (& Supp. III) 201 *et seq.*, provides in pertinent part:

29 U.S.C. (& Supp. III) 203:

> As used in this chapter—
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> * * * * *
>
> (d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an em-

ployer) or anyone acting in the capacity of officer or agent of such labor organization.

* * * * *

(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose. * * * For purposes of this subsection, the activities performed by any person or persons—

* * * * *

(2) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(3) in connection with the activities of a public agency,

shall be deemed to be activities performed for a business purpose.

* * * * *

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person, and which—

* * * * *

(6) is an activity of a public agency.

* * * * *

The employees of an enterprise which is a public agency shall for purposes of this subsection

be deemed to be employees engaged in commerce, or in the production of goods for commerce, or employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce.

29 U.S.C. (Supp. III) 206(a):

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than $2.65 an hour during the year beginning January 1, 1978, not less than $2.90 an hour during the year beginning January 1, 1979, not less than $3.10 an hour during the year beginning January 1, 1980, and not less than $3.35 an hour after December 31, 1980, except as otherwise provided in this section;

29 U.S.C. 207(a):

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.